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## Dartmouth College v. Woodward and the Structure of Civil Society

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Ernest A. Young

## *Dartmouth College v. Woodward* and the Structure of Civil Society

18 U.N.H. L. REV. 41 (2019)

**AUTHOR.** Alston & Bird Professor, Duke Law School. This essay is a modified version of remarks given at Dartmouth College’s celebration of the 200<sup>th</sup> anniversary of *Dartmouth College v. Woodward*. I am grateful to Justice James Bassett and Professor Donald Pease for spearheading that event, to John Greabe for getting me involved, and to the University of New Hampshire Law Review for publishing the proceedings. I first encountered the *Dartmouth College* case in the undergraduate constitutional law course taught by the late Professor Vincent Starzinger, who embodied Dartmouth’s commitment to extraordinary undergraduate teaching and inspired many of us to become lawyers. Professor Starzinger deserves most of the credit for anything of value in this essay, but the errors are all my own.

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## INTRODUCTION

*Dartmouth College v. Woodward* held that a private college's charter was a contract, and that the State of New Hampshire's effort to alter the terms of that charter impaired the obligation of the contract in violation of the Constitution's Contract Clause.<sup>1</sup> As a matter of doctrine, *Dartmouth College* has relatively little significance today. Its particular holding is readily drafted around. Once the Court held that the Contract Clause applied only to retrospective impairments of contractual obligations,<sup>2</sup> states could include limitations on the rights conveyed in such charter at the time they were issued. The Contracts Clause retains more force in cases involving the State's own agreements than it does with respect to regulation of private contracts,<sup>3</sup> but contemporary federal litigation under the Contracts Clause—much less claims relying directly on *Dartmouth College*—remains quite rare.<sup>4</sup> A plausible working title for these remarks would be: "It is an obscure case, yet but there are those who love it."<sup>5</sup>

Nonetheless, by holding that New Hampshire could not alter the terms of Dartmouth's charter, the Supreme Court prevented the Granite State from interfering in Dear Old Dartmouth's affairs.<sup>6</sup> *Dartmouth College* is frequently credited with establishing the autonomy of private higher education in America.<sup>7</sup>

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<sup>1</sup> See *Dartmouth College*, 17 U.S. (4 Wheat.) 518 (1819).

<sup>2</sup> See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

<sup>3</sup> See, e.g., *United States Tr. Co. v. New Jersey*, 431 U.S. 1 (1977) (invalidating legislation allowing a state to retroactively alter the terms of its bond obligations).

<sup>4</sup> But see Emily D. Johnson & Ernest A. Young, *The Constitutional Law of State Debt*, 7 DUKE J. CONST. L. & PUB. POL'Y 117, 131–34 (2012) (discussing recent Contract Clause litigation concerning state efforts to adjust their pension obligations).

<sup>5</sup> Apologies to Daniel Webster (Dartmouth class of 1801), who, in his argument before the U.S. Supreme Court on the College's behalf, famously said, "It is Sir, as I have said, a small college. And yet there are those who love it!" Or at least we *think* he said this. Webster's peroration is not included in Wheaton's report of the case. It traces to an account by Chauncey Goodrich, a Yale professor who attended the argument and thirty-six years later wrote down his recollection in a letter to Rufus Choate. See generally G. EDWARD WHITE, *THE MARSHALL COURT & CULTURAL CHANGE*, 1815–1935, at 615–16 (abr. ed. 1991) (quoting Choate's report of the peroration and expressing some skepticism). Of course, every true son or daughter of Dartmouth accepts the Goodrich-Choate text of Webster's peroration as an article of faith—just as we know that the Lorax is real and that forest green is the most beautiful color on Earth.

<sup>6</sup> *Dartmouth College*, 17 U.S. (4 Wheat.) at 652–54.

<sup>7</sup> See, e.g., John S. Whitehead, *How to Think about the Dartmouth College Case*, 26 HIST. OF EDUC. QUART. 333, 334 (1986) ("Almost every previous historian of higher education . . . had asserted in

Chancellor Kent, for example, said that the decision “did more than any other single act . . . to give solidity and inviolability to the literary, charitable, religious and commercial institutions of our country.”<sup>8</sup> Kate Stith-Cabranes has shown that New Hampshire’s intentions were plausibly benign.<sup>9</sup> But it is hardly difficult to imagine less savory efforts by state (or federal) governments to undermine freedom of teaching and inquiry at private universities—perhaps to prevent criticism of government policy or simply to favor particular government interests.<sup>10</sup>

When we think of the autonomy of universities in American constitutional law, we generally think of the First Amendment’s protections for academic freedom.<sup>11</sup> But other constitutional principles also protect the autonomy of universities. I focus here on the important *structural* role that the Contract Clause played in *Dartmouth College v. Woodward*. The Contracts Clause is, at first glance, a rights provision, protecting individuals from the governmental impairment of their contractual entitlements.<sup>12</sup> But as Akhil Amar has shown, rights provisions play vital structural roles in American Constitutionalism.<sup>13</sup> By insulating private universities from public control, the Marshall Court’s interpretation of the Contracts Clause in *Dartmouth College* helped to ensure that private institutions of higher learning would remain autonomous voices in American civil society.

The importance of such voices was a central concern for Alexis de Tocqueville, who published *Democracy in America*<sup>14</sup> in 1835 as the Marshall Court was drawing to

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one form or another that the Supreme Court’s decision in that case encouraged the development of ‘private’ colleges by protecting them from state encroachment.”).

<sup>8</sup> Quoted in Justin Zarembky, *The Dartmouth College Case* at 200, THE NEW CRITERION (Feb. 2019), <https://newcriterion.com/print/article/10590> [<https://perma.cc/R8MU-JE3K>]; see also Harry A. Blackmun, *Remarks*, in A CEREMONY MARKING THE 175<sup>TH</sup> ANNIVERSARY OF THE SUPREME COURT DECISION IN THE DARTMOUTH COLLEGE CASE 5, 6 (Feb. 2, 1994) [hereinafter 175<sup>TH</sup> ANNIVERSARY CEREMONY].

<sup>9</sup> Kate Stith-Cabranes, *Trustees of Dartmouth College v. Woodward and the Enduring Significance of Self-Governance*, in 175<sup>TH</sup> ANNIVERSARY CEREMONY, *supra* note 8, at 12–13.

<sup>10</sup> See *infra* notes 107–109 and accompanying text.

<sup>11</sup> See, e.g., *Keyishian v. Bd. of Regents of the Univ. of the State of New York*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

<sup>12</sup> The Contracts Clause provides that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .” U.S. CONST. art I, § 10, cl. 1. See generally JAMES W. ELY, JR., *THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY* (2016).

<sup>13</sup> See generally Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131 (1991).

<sup>14</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop, eds. 2000) (1835, 1840).

a close. Tocqueville saw democratic equality as the central fact about America.<sup>15</sup> He thought that the great risk that such a democracy would run was the propensity of democratic levelling to clear out all the intermediary institutions—feudal aristocracies, church establishments, trading guilds and the like—that once existed between the individual and the state. With these intermediary institutions gone, individuals would be ill-equipped to resist a form of “democratic despotism” by which the State would gather all power to itself in the name of providing for human wants.<sup>16</sup> Tocqueville thought the answer to this propensity in democratic societies was a robust civil society full of active private associations and other intermediary institutions.<sup>17</sup>

It is thus an important but sometimes overlooked part of the genius of our Constitution that it facilitates the development of a robust civil society. It does not simply protect the individuals in that society from restriction of their rights; it also provides mechanisms that encourage the development of vibrant private institutions capable of checking government action even when individuals cannot. *Dartmouth College* is an important part of that story. I also want to argue, however, that this rosy outcome is not inevitable, and that certain developments in American politics threaten the ability of private intermediary institutions—including universities, but not *only* universities—to play the vital role that Tocqueville and the Founders envisioned for them.

## I. DARTMOUTH COLLEGE AND THE CONTRACT CLAUSE

The Contract Clause provides that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .”<sup>18</sup> We generally think about this Clause as an individual rights provision, and it is. When the Framers worried about the tyranny of the majority, they tended to have foremost in mind, not white slaveholders oppressing black people, or religious majorities oppressing dissenters, but rather populist appeals to oppress creditors by relieving debtors of their contractual obligations. And so the Contracts Clause, which tends to foreclose debt relief legislation, was the most important rights provision included in the original Constitution prior to ratification of the Bill of Rights.<sup>19</sup> The sort of economic rights that the Contract Clause protects have largely fallen out of favor in contemporary

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<sup>15</sup> See *id.*, Vol. I, Introduction, at 3.

<sup>16</sup> See *id.*, Vol. II, Part Four, ch. 2–3, at 640–45; ch. 6, at 661–65.

<sup>17</sup> See *id.*, Vol. II, Part Two, ch. 5, at 489–92; Part Four, ch. 7, at 666–73.

<sup>18</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>19</sup> See generally ELY, *supra* note 12.

jurisprudence, but that should not blind us to the fact that the Contract Clause was the Constitution's most frequently litigated and enforced rights provision at least until ratification of the Fourteenth Amendment.

*Dartmouth College v. Woodward* was a key early precedent establishing the Contract Clause's scope and importance.<sup>20</sup> The British crown granted a charter to the trustees of Dartmouth College in 1769. It did so at the urging of Eleazar Wheelock, a Congregationalist minister who was looking to expand his efforts to educate Native Americans and to branch out into educating English colonists as well.<sup>21</sup> Although the Supreme Court's opinion in the *Dartmouth College* case characterized the College's founding as a wholly private affair, that account omits not only significant public contributions of money and land but also a significant public purpose: "preparing men for positions in the ministry and in civic leadership, with perhaps some elementary teaching of Indians, to boot."<sup>22</sup> The charter made Eleazar Wheelock president of the new college for life, and it also allowed him to choose as his successor his son John Wheelock. Toward the end of John Wheelock's thirty-five year tenure, however, disputes arose between him and the College's trustees.<sup>23</sup> John Wheelock penned an anonymous indictment of the trustees' meddling in college affairs; the trustees responded with an investigation; and John Wheelock ultimately sought support from New Hampshire's Governor and legislature.<sup>24</sup>

The Dartmouth Trustees dismissed John Wheelock from the presidency in 1815, and Wheelock again turned to the legislature for support. The state legislature—

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<sup>20</sup> For accounts of the case, see Stith-Cabranes, *supra* note 9, at 15–16; WHITE, *supra* note 5, at 175–80, 612–28; DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 141–45 (1985).

<sup>21</sup> *Id.*

<sup>22</sup> Stith-Cabranes, *supra* note 9, at 14; *see also* JOHN S. WHITEHEAD, *THE SEPARATION OF COLLEGE AND STATE: COLUMBIA, DARTMOUTH, HARVARD, AND YALE 1776-1876*, at 15, 31–36 (1973).

<sup>23</sup> John Wheelock appears to have been a somewhat overbearing sort; the trustees would later complain that "[s]uch men are always the heroes of their own story." (Quoted in WHITEHEAD, *supra* note 22, at 55). As Professor Stith-Cabranes notes, however, the dispute stemmed not simply from Wheelock's alleged incompetence and dictatorial tendencies, but also from religious disputes arising out of the Second Great Awakening. *See* Stith-Cabranes, *supra* note 9, at 1411–12; Steven Novak, *The College in the Dartmouth College Case: A Reinterpretation*, 47 *NEW ENGLAND QUARTERLY* 550, 563 (1974). And the State's attempt to take control of the College was not simply a naked power grab; rather, it represented a genuine dispute over the appropriate nature of higher education and the State's role in it. *See* Stith-Cabranes, *supra* note 9, at 12–13; Eldon L. Johnson, *The Dartmouth College Case: The Neglected Educational Meaning*, 3 *J. EARLY REPUBLIC* 45 (1983).

<sup>24</sup> *See* WHITEHEAD, *supra* note 22, at 53–59.

now controlled by Jeffersonian Republicans hostile to the Federalist trustees—enacted a statute amending Dartmouth’s charter. These amendments increased the number of trustees from twelve to twenty-one, empowered the state governor to appoint the new trustees, and created a board of overseers—also appointed by the governor—that would control the trustees on important matters.<sup>25</sup> The statute even touched that third rail of Dartmouth alumni politics, rebranding our beloved College on the Hill as “Dartmouth University.”<sup>26</sup> It may be an exaggeration to say, as David Currie put it, that the legislature had “turned a private school into a public one”;<sup>27</sup> as other historians have pointed out, Dartmouth would still have retained considerable autonomy under the new arrangement.<sup>28</sup> Nonetheless, the changes were too much for the board. The old trustees filed suit against the College’s treasurer, who had sided with Wheelock and the State, to recover the College’s seal and other corporate property from the interlopers. The key allegations were that the College’s original charter was a contract, and that New Hampshire’s law reorganizing the College impaired the obligation of that contract in violation of the federal Constitution.<sup>29</sup>

When the case reached the Supreme Court, Chief Justice John Marshall thought that “[i]t can require no argument to prove, that the circumstances of this case constitute a contract.”<sup>30</sup> He thus set out to decide two questions: “1. Is this contract protected by the constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?”<sup>31</sup> The first issue came down largely to whether the charter was a “public” or a “private” contract:

If the act of incorporation be a grant of political power, if it create a civil institution, to

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<sup>25</sup> See *Dartmouth College*, 17 U.S. (4 Wheat.) at 652; see also WHITEHEAD, *supra* note 22, at 59–63.

<sup>26</sup> See Stith-Cabranes, *supra* note 9, at 10–11; see also *Dartmouth College*, 17 U.S. (4 Wheat.) at 664 (Washington, J., concurring) (“The name of the corporation, its constitution and government, and the objects of the founder, and of the grantor of the charter, are totally changed.”). On the continually fraught issue of a name change, see, for example, Joseph Asch, *Trustees Seriously Debate Name Change to Dartmouth University*, DARTBLOG (Jan. 17, 2013), <http://www.dartblog.com/data/2013/01/010586.php> [<https://perma.cc/75WJ-9C55>] (asserting that “the alumni would be aghast”).

<sup>27</sup> CURRIE, *supra* note 20, at 143. It is worth remembering that the sharp modern distinction between “public” and “private” institutions developed somewhat later. Institutions like Harvard, Yale, Columbia, and Dartmouth all received considerable public support, and had considerable public involvement in governance, in the early Republic. See generally WHITEHEAD, *supra* note 22, at 4–5, 9–52.

<sup>28</sup> See WHITEHEAD, *supra* note 22, at 63–64.

<sup>29</sup> *Dartmouth College*, 17 U.S. (4 Wheat.) at 604.

<sup>30</sup> *Id.* at 627.

<sup>31</sup> *Id.*

be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions . . . the legislature of the state may act according to its own judgment, unrestrained by . . . the constitution of the United States.

But if this be a private eleemosynary institution, endowed . . . for objects unconnected with government, whose funds are bestowed by individuals, on the faith of the charter . . . there may be more difficulty in the case . . .<sup>32</sup>

This may have been, as Judge Henry Friendly suggested, an overly bright line.<sup>33</sup> And Chief Justice Marshall's conclusion that the College fell on the private side of it may have failed to consider important evidence that would have muddied the waters, as Professor Stith-Cabranes has pointed out.<sup>34</sup> Nonetheless, the Court concluded:

Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; that its trustees . . . were originally named by the founder . . . ; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity-school . . .<sup>35</sup>

Hence, the College's charter was a contract fully entitled to protection under the

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<sup>32</sup> *Id.* at 629–30.

<sup>33</sup> See HENRY J. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* 10 (1969). After all, as Judge Friendly demonstrated, current “state action” doctrine has “increasingly blurred” the distinction between government and private actors. *Id.* at 11. It seems to this author, nonetheless, that one might accept the blurry proposition that many purportedly private entities may be state actors for purposes of applying constitutional constraints to *their* actions, see, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001) (holding that state interscholastic athletic association was a state actor subject to the First Amendment even though the NCAA at the college level was not), without necessarily undermining Marshall's distinction in *Dartmouth College*. For example, federal courts law recognizes a number of different “state-ness” tests for different purposes and in different contexts. See, e.g., *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) (applying a multifactor test to determine what actors count as an “arm of the state” enjoying state sovereign test); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913) (holding that a state officer may be a state actor for Fourteenth Amendment purposes even if acting in violation of state law); *Ex parte Young*, 209 U.S. 123 (1908) (holding that suit to enjoin a state officer for acting outside his lawful authority under federal law is *not* against the “state” for state sovereign immunity purposes). Surely one may read Chief Justice Marshall as fashioning his particular public/private distinction test simply for the purpose of determining which state-granted charters trigger the protections of the Contracts Clause. On the other hand, many of the concerns that Judge Friendly had about an overly expansive state action doctrine impinging on the autonomy of private institutions have come to pass, as I discuss in the concluding section.

<sup>34</sup> See Stith-Cabranes, *supra* note 9, at 14 (concluding that “the actual birth of the Dartmouth College was the joint product of private and public assets, of private and public efforts”).

<sup>35</sup> *Dartmouth College*, 17 U.S. (4 Wheat.) at 640–41.



Contract Clause.<sup>36</sup>

The Court had even less trouble determining that the act of the New Hampshire legislature had impaired this contract. Chief Justice Marshall observed that “[t]he whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. . . . This is not an immaterial change.”<sup>37</sup> Importantly, the Court did not care whether the changes introduced to the College by public governance would make good policy sense. Those changes, the Court said, “may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.”<sup>38</sup> As primary protection for property rights shifted from contract to due process over the next century, however, the reasonableness of state interference with contractual rights would become the central question even when the Contracts Clause itself was invoked.<sup>39</sup>

The outcome in *Dartmouth College* was hardly inevitable. In particular, it was not obvious that the Court would extend the Contract Clause’s protection to corporate charters. As Chief Justice Marshall acknowledged, “[i]t is more than possible, that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument.”<sup>40</sup> Rather, he suggested, “interferences of more frequent occurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures.”<sup>41</sup> Marshall no doubt had in mind the debtor relief legislation adopted by several state legislatures during the Confederation period.<sup>42</sup> By restricting debtor relief legislation, the Contract Clause protected

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<sup>36</sup> See *id.* at 650.

<sup>37</sup> *Id.* at 652.

<sup>38</sup> *Id.* at 653.

<sup>39</sup> See, e.g., *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 505–06 (1987); *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412–13 (1983); see also ELY, *supra* note 12, at 245–47.

<sup>40</sup> *Dartmouth College*, 17 U.S. (4 Wheat.) at 644; see also WHITE, *supra* note 5, at 176 (“[I]t was by no means clear that a royal charter, imposing no limitations on its recipient, was a contract within the meaning of the Constitution.”).

<sup>41</sup> *Dartmouth College*, 17 U.S. (4 Wheat.) at 644.

<sup>42</sup> See ELY, *supra* note 12, at 8–9; see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 403–09 (1969) (identifying state debtor relief legislation as one of the key abuses of legislative power that concerned the Constitution’s framers).

contracts among *private* individuals and entities. The Clause prevents the government from helping out one set of private parties (debtors) at the expense of another set of private parties (creditors) by restricting the debtor's obligation to pay or the creditor's remedies to enforce the deal.

*Dartmouth College* applied the Contract Clause to a different scenario entirely, however. Like its predecessor case *Fletcher v. Peck*,<sup>43</sup> *Dartmouth College* dealt with the State's own contracts, not contracts among private actors.<sup>44</sup> But the State's contract in *Fletcher* was a simple deal to sell land (if you can call a fraudulent deal to sell most of the later states of Alabama and Mississippi "simple").<sup>45</sup> The contract in *Dartmouth College* was the College charter itself—that is, it was an agreement that not only formalized a transaction, but created an *institution*. The Supreme Court's holding that the State of New Hampshire could not retroactively alter the terms of the charter established Dear Old Dartmouth's autonomy from government control. As Justice Bushrod Washington's concurrence put it, "private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them."<sup>46</sup>

Some scholars have insisted that the historical evidence supports application of the clause only to contracts among private parties, although recent scholarship disputes this view.<sup>47</sup> Evidence suggests, for instance, that the Framers may have intended to respond to controversies over legislative revocation of the charter of the Bank of North America.<sup>48</sup> In any event, my point is simply that even though Marshall's opinion focused on whether Dartmouth's charter was the sort of charter protected by the Contract Clause—that is, whether the institution it created was "public" or "private" in character—the decision is also significant for its affirmation that charters could be covered at all. That affirmation had significant institutional consequences for American civil society.

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<sup>43</sup> *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

<sup>44</sup> Although the Court focused on whether the charter had created a "public" or "private" institution, the charter itself was plainly a "public" contract in the sense that the State was a party to it.

<sup>45</sup> See generally WHITE, *supra* note 5, at 602–03; CURRIE, *supra* note 20, at 128–29.

<sup>46</sup> *Dartmouth College*, 17 U.S. (4 Wheat.) at 660 (Washington, J., concurring).

<sup>47</sup> Compare BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION (1938) (arguing that the clause protected only contracts among private parties), with ELY, *supra* note 12, at 269–70 (rejecting this claim).

<sup>48</sup> See ELY, *supra* note 12, at 9–10.

## II. THE STRUCTURAL DIMENSION OF RIGHTS CLAIMS

One can't be much of a *vox clamantis in deserto*<sup>49</sup> if the Government is telling one what to cry out about. American law has long respected the importance of institutional autonomy for colleges and universities, although nowadays we typically look to the First Amendment as the primary ground for that autonomy.<sup>50</sup> But the early Republic lacked modern conceptions of academic freedom, and the First Amendment did not yet bind the State of New Hampshire in 1819.<sup>51</sup> Historian Jurgén Herbst thus describes the Court's Contract Clause holding in *Dartmouth College* as "the *magna carta* of the American system of higher education in which private and public institutions develop side by side, and the private colleges are protected against state violation of their charter without their consent."<sup>52</sup>

The Court's decision ensured the College's ability to choose its own path without state interference on any number of issues of the day: how to respond to the evangelical tide of the Second Great Awakening; whether to remain an island of Federalist politics amidst a rising tide of Jeffersonian Republicanism; whether to focus on a classical education heavy with dead language or to teach more practical subjects like agricultural science.<sup>53</sup> Today, the College is free to be a critical voice in New Hampshire and national politics, an autonomous forum for debate during presidential campaigns,<sup>54</sup> and an independent pioneer in the College's many fields of teaching and research. This independence is not solely attributable to *Dartmouth College v. Woodward*, of course. But certainly the Marshall Court's decision is an

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<sup>49</sup> The College's motto, which translates to "a voice crying out in the wilderness." See *Dartmouth at a Glance*, <https://home.dartmouth.edu/dartmouth-glance> HOME.DARTMOUTH.EDU [<https://perma.cc/N6PX-XWLF>] (last visited Aug. 29, 2019).

<sup>50</sup> See cases cited in note 11, *supra*; see also Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 925–26 (2006) (offering "an institutional account of the First Amendment" that "recognize[s] a special place for the country's colleges and universities, whose historical and current mission is to play a central role in challenging conventional wisdom"); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L. J. 821, 821–22 (2008).

<sup>51</sup> See *Barron v. Mayor of Baltimore*, 32 U.S. 243 (1833) (recognizing that the original Bill of Rights did not constrain state governments).

<sup>52</sup> Jurgén Herbst, *How to Think about the Dartmouth College Case*, 26 HIST. OF EDUC. QUART. 342, 346–47 (1986).

<sup>53</sup> See Stith-Cabranes, *supra* note 9, at 11–13; Johnson, *supra* note 23, at 50–52.

<sup>54</sup> See, e.g., Dudley Clendinen, *8 Democrats are Enticed into a No-Rules Debate*, N.Y. TIMES (Jan. 12, 1984) [<https://perma.cc/UFN8-JXHH>] (discussing the first televised "talk show" presidential primary debate at Dartmouth College, conducted in a format outside the control of the campaigns).

important part of the story.<sup>55</sup>

My central point is that the autonomy that the *Dartmouth College* case conferred on the College is more than just the sum total of the individual liberties enjoyed by its students and faculty. By safeguarding the autonomy of private institutions of higher learning, the Contract Clause plays a structural role. Professor Akhil Amar has surveyed the many ways in which constitutional provisions that we generally think of as individual rights provisions also play vital *structural* roles in American constitutionalism.<sup>56</sup> The Sixth and Seventh Amendments safeguard not only the individual right of the accused to be judged by a jury of his peers but also the institutional role of the jury as a democratic check on judges and prosecutors.<sup>57</sup> The Second Amendment protects not only, or even primarily, an individual right to bear arms but also the institution of the militia as a military check on centralized tyranny. The original understanding of the Establishment Clause protected *state* establishments of religion against federal interference or a federal effort to establish a national church.

So far, all the examples I've given are *public* institutions—the jury, the militia, an established state church. These institutions are not that different from more familiar structural features of the Constitution's separation of powers. But as Professor Amar also noted, the Bill of Rights protects the autonomy of a number of *private* institutions that also play structural roles. The Press Clause of the First Amendment, for example, protects the autonomy of the media as a vital check on both public and private power.<sup>58</sup> The Speech Clause likewise protects the rights not only of individuals but also of the institutions they form in order to exercise a more effective voice in public affairs, whether those be public interest organizations like the NAACP or the Sierra Club or quasi-public but extra-constitutional entities like

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<sup>55</sup> See, e.g., Whitehead, *How to Think about Dartmouth College*, *supra* note 7, at 338 (conceding the importance of the case in this regard despite prior skepticism).

<sup>56</sup> See Amar, *supra* note 13, at 1131–32.

<sup>57</sup> See, e.g., *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (“That right [to a jury trial] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”).

<sup>58</sup> See, e.g., *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 260 (1974) (White, J., concurring) (“The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”).

political parties.<sup>59</sup> The Religion Clauses, in conjunction, protect the autonomy of religious institutions that play pivotal roles in American public life, whether by political activity, good works, or simply offering the example of an alternative way of life.<sup>60</sup> All these institutions fall outside the *governmental* separation of powers, but they contribute to the broader separation of powers within American civil society.

The structural role that rights-bearing institutions play is distinct from the important role that institutions play in assisting individuals who wish to exercise their constitutional rights. The latter role is more familiar in American law, if not uncontroversial. In *NAACP v. Alabama*,<sup>61</sup> for instance, the Court recognized that allowing a corporation to assert First Amendment rights on behalf of its members could render those members' speech rights more effective. Similarly—but more controversially—the Court has allowed corporations to assert free speech and free exercise claims to challenge federal statutes regulating campaign expenditures and contraceptive insurance, respectively.<sup>62</sup> In this essay, however, I want to focus on the more structural role of rights that simply ensure the autonomy of private institutions whose activities contribute to the maintenance of a robust civil society, whether or not those activities themselves involve the exercise of constitutional rights.

The Contract Clause, as interpreted in *Dartmouth College*, falls squarely into this category of rights provisions with structural implications. This structural aspect of the case is part of what may be lost in the movement from contract to due process in contemporary Contract Clause doctrine. Once the Court found that the College Charter was a protected contract, it asked only whether the State of New Hampshire's law purporting to modify that contract had modified the charter's

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<sup>59</sup> See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963) (recognizing right of NAACP to challenge state restrictions on its activities under the First Amendment); see also *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (striking down California's blanket primary on the ground that it violated a political party's First Amendment right of association).

<sup>60</sup> See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 183–84 (2012) (recognizing that the Establishment and Free Exercise Clause, in tandem, shield religious organizations from certain forms of government interference with their autonomy); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (recognizing churches' "power to decide for themselves, free from state interference, matters of church governance as well as those of faith and doctrine"); see generally Richard W. Garnett, *The Freedom of the Church: (Towards) an Exposition, Translation, and Defense*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 39 (Micah Schwartzman, Chad Flanders, & Zoë Robinson, eds. 2015).

<sup>61</sup> 357 U.S. 449, 458–459 (1958).

<sup>62</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

terms and transferred power to govern the institution from the Trustees to the State.<sup>63</sup> It didn't ask whether the educational reforms that the State had arguably taken control of the College to effect were reasonable or beneficial. As Professor Stith-Cabranes has demonstrated, they quite plausibly *were* reasonable and beneficial.<sup>64</sup> Contemporary Contract Clause doctrine, which is modeled on the Due Process Clause's deferential reasonableness test,<sup>65</sup> would have asked precisely that question.

One hopes that if the contemporary Court confronted a Contract Clause case like *Dartmouth College*, where the question is the State's power to alter an agreement providing for an institution's basic autonomy, the only issue would be whether the challenged law meaningfully impaired that autonomy. That is what the Court has done in analogous cases under the Religion Clauses. In the *Hosanna-Tabor* case,<sup>66</sup> for instance, the Court unanimously confirmed the "ministerial exception," which guarantees religious institutions' autonomy to choose whom they like to perform ministerial functions without regard to the reasonableness of the constraints that the State might like to impose. The crucial point is that the movement from contract to due process in protecting contractual rights should not be allowed to obscure the Contract Clause's important structural role in protecting the autonomy of contractual institutions.

### III. PRIVATE COLLEGES, INTERMEDIARY INSTITUTIONS, AND THE CONSTITUTIONAL SAFEGUARDS OF CIVIL SOCIETY

The remainder of this essay considers the importance of this sort of institutional autonomy for American politics and society. To do that, I turn to Alexis de Tocqueville's analysis of American society, which he published in 1835 and 1840 at the close of the Marshall Court.<sup>67</sup> Tocqueville thought that the dominant characteristic of American democracy was the widespread condition of equality among Americans; equality was, for him, "the generative fact from which each

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<sup>63</sup> See *Dartmouth College*, 17 U.S. (4 Wheat.) 518, 652–53 (1819).

<sup>64</sup> Stith-Cabranes, *supra* note 9, at 13.

<sup>65</sup> See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505–06 (1987); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412–13 (1983); see also ELY, *supra* note 12, at 245–47.

<sup>66</sup> *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188–89 (2012)

<sup>67</sup> As Professor White notes, Tocqueville's famous observations about the role of law and lawyers in American society pertained to the Marshall Court era and were influenced significantly by Justice Story's *Commentaries on the Constitution*. See WHITE, *supra* note 5, at 111.

particular fact seemed to issue.”<sup>68</sup> Although he did not overlook the glaring inequalities of slavery,<sup>69</sup> he focused on the absence in white American society of the fixed social hierarchies associated with European monarchy and aristocracy.<sup>70</sup>

Tocqueville thought American equality left our society open to a particular danger, however, which he variously called “individualism” or “democratic despotism.”<sup>71</sup> He worried that “when citizens are all nearly equal, it becomes difficult for them to defend their independence against the aggressions of power.”<sup>72</sup> This is in part because equality tends to induce each citizen “to isolate himself from the mass of those like him and to withdraw to one side with his family and his friends, so that after having thus created a little society for his own use, he willingly abandons society at large to itself.”<sup>73</sup> Moreover, the tide of democratic equality tends to wash away all the traditional intermediary institutions that used to stand between the individual and the state: the aristocracy, the established Church, the merchant and craft guilds, and the like.<sup>74</sup> Once this occurred, Tocqueville worried, the individual would find herself isolated from her fellows and unable to prevent the inexorable expansion of the State.<sup>75</sup> This would end, Tocqueville believed, not in the

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<sup>68</sup> See TOCQUEVILLE, *supra* note 14, Introduction, at 3.

<sup>69</sup> See *id.*, Vol. I, Part Two, ch. 10, at 326 (identifying the problem of slavery as “[t]he most dreadful of all the evils that threaten the future of the United States”).

<sup>70</sup> See *id.*, Vol. 1, Part 1, ch. 3, at 45–53.

<sup>71</sup> *Id.*, Vol. 1, Part 1, ch. 3, at lii, lxiii.

<sup>72</sup> See *id.*, Vol. 1, Part 1, ch. 3, at 52.

<sup>73</sup> See *id.*, Vol. 2, Part 2, ch. 2, at 482.

<sup>74</sup> See *id.*, Vol. 2, Part 4, ch. 2, at 640 (observing that “[t]he idea of secondary powers, placed between sovereign and subjects, naturally presented itself to the imagination of aristocratic peoples” but “is naturally absent from the minds of men in centuries of equality”); Harvey C. Mansfield & Delba Winthrop, *Editors’ Introduction*, to TOCQUEVILLE, *supra* note 14, at lxxi (describing the checking roles of “secondary powers” of aristocracy, clergy, and local administration); see also John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 501 (2002) (criticizing the Warren Court, which “both expanded the power of the centralized state and carved out a sphere of personal expression and sexual autonomy,” for failing to “concentrate on protecting institutions that mediate between the centralized state and the individual”).

<sup>75</sup> See TOCQUEVILLE, *supra* note 14, Vol. 2, Part 4, ch. 3, at 643–45; see also YUVAL LEVIN, *THE FRACTURED REPUBLIC: RENEWING AMERICA’S SOCIAL CONTRACT IN THE AGE OF INDIVIDUALISM* 186 (2016) (“[A]s our own experience has demonstrated, hyper-individualism and excessive centralization are not opposite inclinations but complementary impulses. As a centralizing government draws power out of the mediating institutions of society, it leaves individuals more isolated; and as individualism further erodes the bonds that hold civil society together, people conclude that only a central authority can pick up the slack.”).

violent tyranny of past ages but in a despotism that “would be more extensive and milder, and [that] would degrade men without tormenting them.”<sup>76</sup> These concerns about the erosion of the American social fabric still echo in the work of contemporary social scientists like Robert Bellah<sup>77</sup> and Robert Putnam.<sup>78</sup>

Tocqueville thought the way out of this dilemma for egalitarian democracies lay in Americans’ propensity to replace the old intermediary institutions with a wide array of decentralized political institutions and private associations.<sup>79</sup> These institutions and associations tended to pull individuals out of themselves and encourage them to combine and cooperate with their fellow citizens.<sup>80</sup> As John McGinnis explains, “[c]ivil associations promote reciprocity among their members and create social norms from which other individuals can voluntarily choose. In this way they generate what modern sociologists would call social capital: the glue that binds society together through a group of interlocking networks.”<sup>81</sup> Edmund Burke expressed a similar idea when he said that “[t]o be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed toward a love to our country, and to mankind.”<sup>82</sup>

One might think of these civic institutions in terms of James Madison’s “extended sphere” of the American Republic, in which a “greater variety of parties and interests” competes, cooperates, and negotiates.<sup>83</sup> Madison’s extended sphere is inhabited not by individuals, but by groups and institutions. This grand mosh pit of clashing interests and institutions provides a filter and a check upon the selfish interests of particular factions, but it depends on the existence of a vibrant civil society full of varied intermediary institutions. As Tocqueville put it, “[a] political,

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<sup>76</sup> TOCQUEVILLE, *supra* note 14, Vol. 2, Part 4, ch. 6, at 662.

<sup>77</sup> See ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM N. SULLIVAN, ANN SWIDLER, & STEVEN M. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

<sup>78</sup> See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000). See also Myron Magnet, *The End of Democracy in America*, CITY J., Spring 2016, at <https://www.city-journal.org/html/end-democracy-america-14332.html> [<https://perma.cc/MCM6-A4FX>] (arguing that Tocqueville accurately—and ominously—predicted the growth of the centralized American administrative state).

<sup>79</sup> See TOCQUEVILLE, *supra* note 14, Vol. II, Part Two, ch. 5, at 489–92; Part Four, ch. 7, at 666–73.

<sup>80</sup> See *id.*, Vol. II, Part Two, ch. 5, at 492.

<sup>81</sup> McGinnis, *supra* note 74, at 491.

<sup>82</sup> EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE*, 41 (J. G. A. Pocock ed., Hackett Pub. Co. 1987) (1790).

<sup>83</sup> See *The Federalist* No. 10, at 64 (James Madison) (Jacob E. Cooke, ed., 1961) (1787).



industrial, commercial, or even scientific and literary association is an enlightened and powerful citizen whom one can neither bend at will nor oppress in the dark and who, in defending its particular rights against the exigencies of power, saves common freedoms.”<sup>84</sup>

Tocqueville gives us a lens to understand not only Federalist 10 but also Federalist 51, in which Madison talks about institutional checks and balances in the separation of powers.<sup>85</sup> Federalist 51 focuses on public institutions: the mutually checking prerogatives of Congress, the President, the Judiciary, and (at the end) the States.<sup>86</sup> But Tocqueville emphasizes what Madison also recognized in Federalist 10, which is that the structure of civil society itself is crucial in maintaining constitutional government.<sup>87</sup> A civil society full of robust intermediary institutions both helps prevent concentrations of power within the Government and also keeps the Government from dominating the private sector.<sup>88</sup> With apologies to my friend Heather Gerken, who wrote an article entitled “Federalism All the Way Down,”<sup>89</sup> we might call this “Separation of Powers All the Way Out.” But whatever we call it, the key point is that “constitutionalism relies not only on the separation and limitation of the powers of the political authority, but also on the existence and health of authorities and associations outside, and meaningfully independent of, that political authority.”<sup>90</sup>

What does all this have to do with the *Dartmouth College* case? I want to make both a general and a more specific point. The broad point is that the constitutional order does not simply piggyback upon a pre-existing civil society; it helps to create and perpetuate that society by protecting the autonomy of private intermediary institutions. As I’ve already noted, the Press Clause helps generate and preserve an independent Fourth Estate, while the Religion Clauses help encourage and protect robust religious institutions and associations that are independent of state control. Likewise, *Dartmouth College*’s construction of the Contract Clause protected these intermediary institutions’ integrity and right to self-government. As Judge Henry Friendly put it, “one of the great contributions of the *Dartmouth College* decision was

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<sup>84</sup> TOCQUEVILLE, *supra* note 14, Vol. II, Part Four, ch. 7, at 668.

<sup>85</sup> The Federalist No. 51, at 347–53 (James Madison) (Jacob E. Cooke, ed., 1961) (1788).

<sup>86</sup> See *id.* at 347–49.

<sup>87</sup> See Mansfield & Winthrop, *supra* note 74, at xliii (discussing Tocqueville’s emphasis on sociology and psychology over formal political structures).

<sup>88</sup> See TOCQUEVILLE, *supra* note 14, Vol. II, Part Four, ch. 7, at 667–69.

<sup>89</sup> Heather K. Gerken, The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down, 134 HARV. L. REV. 5 (2010).

<sup>90</sup> Garnett, *supra* note 60, at 46.

the impetus it gave to voluntary associations as a factor in American life.”<sup>91</sup>

The narrow point has to do with private colleges and universities in particular. The last time that the College called people together to celebrate Daniel Webster’s glorious victory—on its 175<sup>th</sup> anniversary in 1994—Justice Harry Blackmun affirmed that “the decision provided a safeguard for the development of private education in this country.”<sup>92</sup> Many factors, of course, contributed to the development of private higher education, and the modern divergence of public and private models didn’t really crystallize until the 1870s.<sup>93</sup> But Justice Blackmun was not wrong to suggest that *Dartmouth College* played an important role. For one thing, as Professor Eldon Johnson observed, it produced “a chilling effect on state intrusion into higher education governance anywhere anytime.”<sup>94</sup>

As I’ve already discussed, a variety of constitutional features—including not only the Contract Clause but also the Free Speech Clause (protecting academic freedom), the Religion Clauses (protecting the autonomy of sectarian religious colleges and universities, which for the first century or so was nearly all of them), and the structure of American federalism—have helped bring about precisely the sort of robust and diverse civil society in the educational sphere that Tocqueville would have praised. We have outstanding research institutions like M.I.T. and Harvard, vibrant sectarian institutions like Notre Dame and Brigham Young, iconoclastic dissenting enclaves like Oberlin and Hillsdale, and even a few professional sports franchises like Oklahoma and Ohio State. These varied institutional models are bound to produce a variety of perspectives and outputs. It would be a mistake to leave out the state schools. One irony of *Dartmouth College v. Woodward* was that the menacing governmental entity was the State of New Hampshire—not exactly an imposing government by today’s standards.<sup>95</sup> By deciding not to create a great centralized *national* university, and by facilitating the development of state land grant colleges through the Morrill Acts,<sup>96</sup> Congress ensured a decentralized future for American higher education even within the public realm. American higher education is a Madisonian extended sphere.

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<sup>91</sup> FRIENDLY, *supra* note 33, at 12.

<sup>92</sup> Blackmun, *supra* note 8, at 6.

<sup>93</sup> See generally Johnson, *supra* note 23, at 63–67.

<sup>94</sup> *Id.* at 67.

<sup>95</sup> But see *Sweezy*, 354 U.S. 234 (1957). In *Sweezy*, the Granite State revived its academic reign of terror, over a century after *Dartmouth College*, by jailing a Marxist academic over a lecture he delivered at the University of New Hampshire. The Supreme Court was not amused, reversing *Sweezy*’s conviction as a violation of due process. See *id.* at 254–55 (plurality opinion).

<sup>96</sup> 7 U.S.C. § 301 *et seq.* (1862, 1890).

And this robust educational constellation does, in fact, perform many of the functions Tocqueville praised in American private associations. College and alumni communities do draw individuals out of their private lives and into community with their fellow members, often for decades after graduation. Colleges habituate individuals to serve others, and they train them to do that service effectively. They may be important participants in national political debates, such as affirmative action,<sup>97</sup> and their internal controversies train individuals to be effective participants in broader debates later on. All this is possible, in part, because the Constitution's rights provisions do not simply empower individuals, but give rise to institutions playing structural roles.

Characteristically, I am going to end with a worry. Just as private institutions may play an important role in the separation of powers, broadly construed, so too that role can be undermined by the same sorts of forces that have undermined separation of powers in the public sphere. One thing plaguing contemporary constitutional theory—and making it a lot more interesting—is the need to revise our assumptions about how institutional checks and balances function in light of changes in the nature of American political life.<sup>98</sup> One such change is a general decline in social capital; as Robert Putnam has observed, “we have been pulled apart from one another and from our communities over the last third of the century.”<sup>99</sup> The other change, of course, is increasingly high degrees of partisanship and ideological polarization.<sup>100</sup>

One can readily see how polarization undermines the effectiveness of other civil society institutions. Polarization has fragmented the media, for example, so that Americans of different ideological persuasions can pretty much choose their media outlets so that they only hear what they want to hear.<sup>101</sup> Churches and other religious institutions have to some extent followed a similar path, and the

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<sup>97</sup> See, e.g., Brief of Harvard University, Brown University, the University of Chicago, Dartmouth College, Duke University, the University of Pennsylvania, Princeton University, and Yale University, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 & 02-516).

<sup>98</sup> See, e.g., Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 50–65 (2018).

<sup>99</sup> PUTNAM, *supra* note 78, at 27.

<sup>100</sup> See, e.g., MARC J. HETHERINGTON & THOMAS J. RUDOLPH, *WHY WASHINGTON WON'T WORK* (2015); Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411 (2014); RONALD BROWNSTEIN, *THE SECOND CIVIL WAR: HOW EXTREME PARTISANSHIP HAS PARALYZED WASHINGTON AND POLARIZED AMERICA* (2007).

<sup>101</sup> See, e.g., Brett Edkins, *Report: US Media Among Most Polarized in the World*, FORBES (June 27, 2017), <https://www.forbes.com/sites/brettedkins/2017/06/27/u-s-media-among-most-polarized-in-the-world-study-finds/#6e070222546> [<https://perma.cc/KPV7-KK34>].

increasing secularism of one party and defensiveness of the other threatens the ability of religious institutions to straddle and meliorate ideological and political divides.<sup>102</sup>

Similar things are happening to institutions of higher education. On the public side, the impression that public universities are out of step with the viewpoints and needs of the run of American society has led to incursions on the independence of those universities. This has happened, for instance, both in my native state of Texas and my current home of North Carolina.<sup>103</sup> But the problem is not confined to public institutions. The perception (and often the reality) that colleges and universities of all stripes have largely taken sides in the partisan and ideological wars<sup>104</sup> has hurt the credibility of academic voices in political and policy debates and may, in the long term, prompt those who feel excluded by all this side-taking to seek other educational models altogether.<sup>105</sup>

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<sup>102</sup> See generally ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 3–4 (2010); Lyman Stone, “Mainline” churches are emptying. *The political effects could be huge*, VOX (July 14, 2017), <https://www.vox.com/the-big-idea/2017/7/14/15959682/evangelical-mainline-voting-patterns-trump> [<https://perma.cc/ES25-XAMD>].

<sup>103</sup> See, e.g., *UT-Austin at center of fight over the purpose of college*, USA TODAY (Feb. 2, 2013) <https://www.usatoday.com/story/news/nation/2013/02/02/texas-higher-ed-clash/1885923/> [<https://perma.cc/SGX6-3D6T>]; Jane Stancill, *There’s a reason UNC’s board seems like an arm of the legislature*, RALEIGH NEWS & OBSERVER (Oct. 27, 2017), <https://www.newsobserver.com/news/local/education/article181345551.html>.

<sup>104</sup> See, e.g., John LaLoggia, *Republicans have doubts that colleges, K-12 schools are open to range of viewpoints*, PEW RESEARCH CENTER (July 19, 2019), <https://www.pewresearch.org/fact-tank/2019/07/19/republicans-have-doubts-that-colleges-k-12-schools-are-open-to-range-of-viewpoints/> [<https://perma.cc/5XTM-EYR>]; Sam Abrams, *Professors moved left since 1990s, rest of country did not*, Research Summary, HETERODOX ACADEMY (Jan. 9, 2015), <https://heterodoxacademy.org/professors-moved-left-but-country-did-not/> [<https://perma.cc/7XL8-C3SQ>]; Mitchell Langbert, Anthony J. Quain, & Daniel B. Klein, *Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology*, 13 *ECON. J. WATCH* 422 (2016); see also Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 *J. LEGAL STUD.* 277 (2015); John L. McGinnis, Matthew Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 *GEO. L.J.* 1167, 1169 (2005).

<sup>105</sup> See, e.g., Anna Brown, *Most Americans say higher ed is heading in wrong direction, but partisans disagree on why*, PEW RESEARCH CENTER (July 26, 2018), <https://www.pewresearch.org/fact-tank/2018/07/26/most-americans-say-higher-ed-is-heading-in-wrong-direction-but-partisans-disagree-on-why/> [<https://perma.cc/3HEH-8HYL>]; Morgan Marietta, *Against the Professors: Perceptions of Ideological Bias and Dueling Facts*, PSYCHOLOGY TODAY (May 16, 2019), <https://www.psychologytoday.com/gb/blog/inconvenient-facts/201905/against-the-professors> [<https://perma.cc/2P9V-8NZ2>]; Glenn Reynolds, *Higher ed’s prejudice problem*, USA TODAY (Feb. 27,

A related concern was voiced by our own Kate Stith-Cabranes at the 175<sup>th</sup> anniversary gathering. She pointed out that:

[T]oday the government's ability to circumscribe the autonomy of colleges and universities—and, of course, note it is the federal government more than the states which threatens to do so—is less likely to take the form of direct legislative fiat and more likely to take the form of conditions attached to the receipt of government aid.<sup>106</sup>

These sorts of conditions have enabled national executive agencies under both the Obama and Trump administrations to induce important changes to university governance through “dear colleague” letters.<sup>107</sup>

I would submit that the tendency of educational institutions to take sides in the ideology wars has undermined their autonomy in these settings. It is a commonplace of separation of powers scholarship that partisan allegiances cause different institutions of government to be less interested in checking encroachments by the other branches when the same political party controls both branches.<sup>108</sup> Partisan agreement may have a similar effect of causing universities to give up too much autonomy when intrusive government measures dovetail with their own ideological convictions. On the other hand, forces seeking to intrude on university policy in less congenial ways may take arguments for institutional autonomy less seriously when those arguments are not consistently advanced. At Duke, where I teach, some of those chickens may be coming home to roost as the Department of Education has threatened to pull federal grants from a Middle East studies program that the Department views as biased.<sup>109</sup>

As Professor Stith-Cabranes acknowledged twenty-five years ago, it is hard to

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2017), <https://www.usatoday.com/story/opinion/2017/02/27/college-conservatives-need-to-be-heard-devos-glenn-reynolds-column/98384458/> [<https://perma.cc/P7A4-YSZ8>].

<sup>106</sup> Stith-Cabranes, *supra* note 9, at 16.

<sup>107</sup> See, e.g., KC Johnson & Stuart Taylor, *The path to Obama's 'Dear Colleague' letter*, THE VOLOKH CONSPIRACY (Jan. 31, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/> [<https://perma.cc/NNU9-DUKK>] (discussing Obama administration guidance on campus sexual assault); Claire Hansen, *New Title IX Guidance Gives Schools Choice in Sexual Misconduct Cases*, U.S. NEWS & WORLD REPORT (Sept. 26, 2017), <https://www.usnews.com/news/education-news/articles/2017-09-26/new-title-ix-guidance-gives-schools-choice-in-sexual-misconduct-cases> [<https://perma.cc/TT6Y-HJ8H>] (discussing Trump administration action rescinding that guidance).

<sup>108</sup> See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

<sup>109</sup> Collin Binkley, *Feds Cite Islam Focus in Review of Duke-UNC Language Grant*, ASSOCIATED PRESS (Sept. 19, 2019), <https://www.apnews.com/430e62044dba43daa3f2332792cd97b2> [<https://perma.cc/3YJH-2CNY>].

oppose intrusions on institutional autonomy when the measures in questions seem profoundly just and correct as a matter of substance.<sup>110</sup> But structural values will not endure if we only defend them when they suit our substantive preferences. More fundamentally, it is important to recognize that much of the value of private intermediary institutions in civil society may stem from their ability, at least in theory, to straddle and meliorate the divides that convulse the governmental sphere. Colleges and universities should be a place where people of varying views come together, and the formidable bonds of loyalty that places like Dear Old Dartmouth engender ought to be a source of common ground. That will help us remember more generally that Americans who passionately disagree about this or that burning issue of the day nonetheless share important things in common.

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<sup>110</sup> See Stith-Cabranes, *supra* note 9, at 16.